IN THE

Supreme Court

OF THE

United States

SILAS A. GILSON,
Appellant,

vs.

THE UNITED STATES,
Appellee.

No. 201.

BRIEF OF APPELLANT

UPON APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

No. 207

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STATEMENT OF THE CASE.

This is an action by the United States as plaintiff against appellant, Silas A. Gilson, as defendant, to cancel the patent to one hundred and twenty acres of land lying on the eastern slope of the Cascade Mountains in Yakima County, State of Washington. The bill alleged that on November 13th, 1899, one Daniel Landis, at the instigation of appellant, made a homestead entry upon this land in the United States Land Office for said district, and on November 21st, 1902, commuted the homestead entry and purchased the land, in virtue of which, patent was issued to Landis for said land on the 21st day of July, 1903; that November 21st, 1902, Landis gave Gilson a mortgage on said land and on the 23d day of July, 1903, conveyed the same to him by deed; that Landis did not enter the land in good faith, but for the purpose and with the intent of getting title to the land for Gilson, and at his instigation, and that the residence and improvements made by Landis were not sufficient; that Landis' action in procuring issuance of patent to himself was fraudulent and that Gilson was a party to such fraud. The defendant denied all the allegations of fraud and insufficiency of residence and cultivation, and trial

was had on the merits before the United States Circuit Court for the Eastern District of Washington, Southern division. None of the testimony was taken before the court, but on stipulation, was taken before a special examiner.

The court found that Landis did not enter the land in good faith, but fraudulently for Gilson's benefit; that Gilson was a party to the fraud and by its decree cancelled the patent.

Gilson appealed to the United States Circuit Court of Appeals for the Ninth Circuit and, on hearing, the decree was affirmed.

SPECIFICATION OF ERRORS.

I.

The court erred in finding, as a matter of fact, that Daniel Landis did not apply to enter the land described in the complaint and decree in good faith and for his own exclusive use and benefit.

II.

The court erred in finding that said Daniel Landis committed fraud in making final proof before the Register and Receiver of the United States Land Office in entering said land.

III.

The court erred in holding, as a matter of fact, that the defendant in this action, Silas A. Gilson, had any knowledge or notice of any fraud committed

by said Daniel Landis in entering said land, if any such fraud was by the said Landis committed.

IV.

The court erred in not dismissing this action.

V.

The court erred in entering a judgment cancelling the patent.

BRIEF OF ARGUMENT.

Our contentions may be summarized as follows:

I.

The evidence having all been taken before a special master, the rule that appellate courts will give great weight to findings of trial courts on questions of fact does not apply.

II.

After Landis had made his homestead filing, he had a right to make an agreement to sell the land and then commute his entry and purchase the land. He did not make final proof under the homestead statute, but purchased the land under Section 2301 of Revised Statutes.

Adams vs. Church, 193 U. S., 510.

Williamson vs. U. S. 207, U. S. 425.

III.

The evidence is insufficient to justify the conclusion that there was any agreement between Landis and Gilson before Landis filed on the land that Lan-

dis was to sell the land to Gilson. Even though Landis was guilty of fraud, there is insufficient evidence that Gilson was a party thereto to authorize cancellation of patent after title thereto has vested in him.

ARGUMENT.

This case, being largely one of fact, we are confronted at the outset with the rule that appellate courts will give great weight to findings of trial courts on questions of fact, where the testimony of witnesses was given in the presence of the judge. The reason for this rule has been too often stated to need repetition. There are many things in the demeanor of a person testifying that add to or detract from the weight that would otherwise be given to the language they employ. But when the reason for the rule fails, the rule itself fails, and so it is that this court is in as good a position to judge of the facts and the credibility to be given the various witnesses as the trial court, none of the witnesses having appeared before him, but having been examined before a special master.

The land of which the patent is sought to be cancelled was not entered by virtue of the homestead law, but was purchased of the United States under Section 2301 of the Revised Statutes, which section allows any one who has made a homestead entry under Section 2289 after fourteen months to make proof of SETTLEMENT, RESIDENCE and CUL-

TIVATION for such period of fourteen months, pay the minimum price for the same and receive a patent.

The only proof required is of settlement, residence and cultivation, and unless there was fraud in the proof as to one of these requirements, then this judgment is wrong, and no agreement made by Landis with Gilson for the sale of the land to Gilson would violate the statute unless such agreement was made before the homestead filing was made. The question of the validity of contracts to sell land prior to the final proof and entry of the same has been before the Supreme Court of the United States in three different kinds of entries of public land by virtue of three separate statutes.

First. In Anderson vs. Carkins, 135 U. S. 483, 34 L. Ed. 272, the court holds that where land was obtained from the United States under a homestead entry where a contract was made after the land was filed on and before final proof, that such contract was void and could not be enforced, but the decision is put on the express ground that the statute required an affidavit of the entryman that he had not alienated any part of the land except as provided in the statute.

Second. In the case of Adams vs. Church, 193 U. S. 510, 48 L. Ed. 769, the court held under the Timber Culture Law that notwithstanding the statute required the entrymen to make an affidavit when he made his filing that he was taking the land for his own exclusive benefit and not for the purpose of

speculation or directly or indirectly for the use or benefit of any other person, that because there was no provision in the act for an affidavit when he made final proof and entered the land, that he not alienated any portion of the land, that a contract to convey the land made after he made his filing and before final proof was valid and could be enforced, making the distinction between the two statutes that one required an affidavit at the time of final proof that the land had not been alienated and that the other did not.

Third. In Williamson vs. The United States, 207 U. S. 425, 52 L. Ed. 278, the court followed the case of Adams vs. Church just cited and held, under the Timber and Stone Act, that there was nothing in the statute that required an affidavit upon making final proof that no part of the land had been alienated and that it was not perjury to make such an affidavit, though it was required by the rules of the department. United States vs. Biggs, 211 U. S. 507; United States vs. Kettenbach, 175 Fed. 463.

Then the question is, does a sale of the land by the entryman of the land embraced in a homestead entry come under the rule adopted by the Supreme Court as to timber culture entries and entry under Timber and Stone Act, or the rule adopted as to final proof of homestead entries, where the entryman does not make final proof, but purchases the land?

The principal reason given by the court for holding that a contract to sell land embraced in a home-

stead, when such contract is made after the filing and before proof is void, is that such a contract cannot be performed without perjury. The court, in Anderson vs. Carkins, supra, said:

"And section 2291, which prescribes the time and manner of final proof, requires that the applicant make 'affidavit that no part of such land has been alienated except as provided in section 2288,' which is for 'church, cemetery or school purposes, or for the right-of-way of railroads.'

The law contemplates five years' continuous occupation by the homesteader with no alienation except for the named purposes. It is true that the sections contained no express prohibition of alienation and no forfeiture in case of alienation, yet under them the homestead right cannot be perfected in case of alienation or contract for alienation without perjury by the homesteader. * * * * * There can be no question that this contract contemplated perjury on the part of Anderson, and was designed to thwart the policy of the government in the Homestead Laws. * * * * * Such a contract is against public policy and will not be enforced in a court of equity."

But the statute does not require such an affidavit in case the homestead entry is commuted and the land purchased of the government. The final proof in such cases is not made under Section 2291, R. S., which requires an affidavit of non-alienation, but under Section 2301, R. S., which was passed in 1891, and is as follows:

"Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail him-

self of the benefits of Section 2289 from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen months from the date of such entry and obtaining a patent therefor upon making proof of settlement and of residence and of cultivation for such period of fourteen months."

This statute passed long after the homestead statute by its terms excludes the operation of the homestead statute in cases where the entry is cummuted and a cash entry of the land made. The words, "Nothing in this chapter shall be so construed to prevent any person from paying the minimum price for the land and obtaining a patent," and naming the proof that they must make in order to obtain such patent makes that section the law of the case to the exclusion of all other laws found in that chapter.

Now, in order to rightfully purchase the land, Landis had to show just these things and no more, to-wit: that he had made a settlement on the land; that he cultivated and resided on the land for fourteen months next before he made proof, and if he made such proof, he was entitled to a patent of the land. And if he had, at some time after he made his homestead entry, and before he commuted and paid for the land, made a written contract to deed the land to Gilson, under the authority of Adams vs. Church, 193 U. S. 510, such contract would be valid and would be enforced by the court. In this connection, we wish to call the court's attention to the fact that any

construction of the statute as it stood prior to March 8th, 1891, has now no force, for prior to that time, Section 2301 provided that proof should be made as in pre-emption rights and the pre-emption law provided for an affidavit of non-alienation, R. S. 1878, Section 2262, while the statute at present states just what the entryman must prove in order to purchase the land, that is: settlement, cultivation and residence for fourteen months. There is no requirement that the applicant to purchase shall make oath that he has not alienated any portion of the land, and as is said in Adams vs. Church, 193 U. S. 510, on page 516:

"The policy of the government to require such affidavit when it intends to make it a condition precedent to granting a title was indicated in the homestead act, and could readily have been pursued by a similar provision in the timber culture act if it was intended to extend the principle of that statute."

And Congress having failed to incorporate such a provision in the act allowing the purchase of the land by the entryman, it must be presumed that no such restriction was intended.

Section 2301 simply gives to the homestead entryman a right to abandon his homestead and to purchase the land embraced in his homestead entry under certain restrictions contained in said section and when the statute says that nothing in that chapter shall be construed to prevent the purchase of the land upon making certain proof, it certainly leaves

nothing to implication, but confines the proof to the matters enumerated in that section.

If this is the law, then, in order to cancel this patent on the ground that Landis had agreed to sell the land to Gilson, it must be shown by clear and convincing evidence that such agreement was made before Landis filed on the land in November, 1899. And the only evidence of any kind on that question are the two sworn statements made by Landis that he had not made any such contract (pages 53, 57 and 64) and of Gilson (page 67).

This land was purchased under Section 2301, R. S. U. S. Under this section one may abandon his rights under the homestead law and purchase the land, and by so doing he makes a new and original entry.

Thrift vs. Delaney, 69 Cal., 188;

Johnson vs. Lumber Co., 24 Ore., 182;

U. S. vs. Howard, 37 Fed., 666.

The statute originally provided that the claimant should make proof of settlement and cultivation, as provided by the law granting pre-emption rights, and under this provision the Land Office probably had the right to require the claimant to make oath that he had not alienated any of the land as required by the pre-emption statute; but under the amendment of March 3d, 1891, this provision was omitted, and the settler is now allowed to purchase the land by simply making proof of settlement, residence and cultivation for fourteen months.

See Fed. Stat. Annotated, Sec. 2301, 26 Stat. at Large, 1098.

Such being the statute, the Land Department had no authority to require an affidavit or proof that the land has not been alienated. The making of such affidavit and statement in final proof would not be perjury and such contract would be valid.

Savage vs. Worsham, 72 Fed. Rep. 601;

U. S. vs. Howard, 37 Fed. Rep. 666;

Adams vs. Church, 193 U. S. 510, 48 L. Ed. 789;

Williamson vs. United States, 207 U. S. 425, 51 L. Ed. 294;

As to the agreement to give a mortgage, it is covered by the foregoing case and is valid if given before patent and even before final proof.

Stark vs. Morgan (Kas.), See 6 L. R. A. (N. S.) 934, and cases cited in opinion and notes.

Orr vs. Stewart, 67 Cal. 275, 7 Pac. Rep. 693.

Stewart vs. Powers, 98 Cal. 514, 33 Pac. Rep. 486.

It would seem from reading the Trial Court's opinion that he thought that it was his duty to cancel the patent if he was not satisfied with the amount of the improvements, but such is not the law. Says the Supreme Court of the United States in U. S. vs. Budd, 144 U. S.

"But after all, the question is not so much one of law for the courts after the issue of the patent, as of fact, in the first instance, for the determination of

the land officers. The courts do not revise their determination upon a mere question of fact. In the absence of fraud or some other element to invoke the jurisdiction and powers of a court of equity, the determination of the land officers as to the fact whether the given tract is or is not fit for cultivation, is conclusive. There is, in such cases, no general appeal from the land officers to the courts, and especially after the title has passed, and the money been paid."

And in the same case, the court says that the rule is, that when in a court of equity it is proposed to set aside a written instrument for frauding the execution of the instrument itself, that the testimony on which it is done must be clear, unequivocal and convincing and that the rule should be even stronger when the government attempts to set aside a patent. In fact, the procedure in the sale of public land under this statute is far more like a proceeding in court than an ordinary sale and deed between individuals. Before a patent can issue, notice must be given by publication in some newspaper in the county where the land is situate, describing the land, giving the name of the settler and his witnesses and the time when he will offer proof, and on the return day he must appear with two witnesses before the Land Officers, who act as a quasi court, and the claimant and his witnesses are examined by the agents of the United States and their testimony taken down and signed by them. The Land Officers pass on the sufficiency of it, and then it is referred to the General Land Office, where, if it is found

sufficient and regular, it is passed and a patent issued. This is, in everything but name, an adjudication and judgment, and to set aside a patent issued in such a formal manner, there certainly should be evidence of fraud that is conclusive. See also United States vs. Clark, 200 U. S. 601; 50 L. Ed. 613; United States vs. Biggs, 211 U. S. 507, 53 L. Ed. 305.

Counsel for the Government in their brief in the Court of Appeals recognize the rule as long ago announced in Maxwell Land Grant Case and thereafter adhered to, that no written instrument, much less a patent, will be set aside or annulled for fraud or mistake in the execution of the instrument itself upon a bare preponderance of evidence, but only on evidence which produces conviction and is clear, unequivocal and convincing, and quote from the case as follows:

"When in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt; * * * but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

Max well Land Grant Case, 121 U. S., 325.

The same rule has been laid down in many other cases, among them are:

Colo. Coal & I. Co. vs. U. S. 123, U. S. 307, 31 L. Ed. 186.

U. S. vs. Stinson, 197 U. S. 200, 49 L. Ed. 725.

Is the evidence sufficient within this rule to justify the conclusion that there was an agreement between Landis and Gilson before Landis filed on the land that after patent he was to sell the land to Gilson? The government contends it is and seeks to establish this contention by circumstances and alleged admissions. Let us first consider the testimony of admissions. The references are to the page of transcript of record. The testimony was taken in 1908, six to eight years after the alleged admissions were made with no claim that the attention of the witnesses had been directed to the admissions between the date of making them and the date of testifying thereto. Charles A. Bryant testified (page 23), on direct examination in behalf of the plaintiff, as follows:

"Q. Did you ever talk with him anything about this land? (referring to defendant).

A. I asked him in the spring of 1902, I think it was in March. I was going over there and I saw Mr. Gilson or a person living down in the building. I didn't know who owned the land at that time, and I never had seen anybody there but this time. It was in the spring, and I seen someone down there and I went down and Mr. Gilson was living there, and I had met Mr. Gilson once before that.

Q. You mean Mr. Gilson was living on the land we are talking about?

A. No, sir; living on lands that he owned, and I asked him who owned different pieces of land up there, and this piece was one.

Q. That is the piece in this case?

A. Yes, sir; and he told me the party's name, and said he was stopping at that time down in the valley. I asked him if he would sell it?

Q. What party did he say it was?

A. He said it was Mr. Landis, and he said he could not; that he owned the building and that he was going to get the land, and that was all that he ever said to me about it."

This testimony was given before the examiner on August 22d, 1908. Mr. Bryant was again called on the 25th day of September, 1908, and testified (page 34) in reference to his former testimony, as follows:

Q. "Now, in your answer you say that Mr. Gilson said that it was Mr. Landis, and he could not—that he owned the building and was going to get the land?

A. That is what he told me.

Q. What do you mean by that? That Mr. Gilson owned the building and Mr. Landis the land?

A. Mr. Gilson owned the building and Landis the land and had agreed to sell it to Mr. Gilson."

And again (page 34):

"Q. In that conversation Mr. Gilson told you he owned the building?

A. Yes, sir.

Q. And that he had an agreement with Landis by which he was going to get the land?

A. Yes, sir."

It will be observed that in his testimony of August 22d, Mr. Bryant stated that Gilson said he was "going to get the land," and that was all he said to the witness about it. In his testimony of September 25th, he goes farther and testifies that Mr. Gilson, at that time, said that Landis had agreed to sell it to Mr. Gilson, and in answer to the question, "Gilson said he had an arrangement with Landis by which he was going to get the land," he answered, "Yes, sir." But on cross-examination (page 35), when asked about his former testimony that Gilson said "he was going to get the land and that was all he ever said to me about it," he answered again, "Yes, sir," so that it is evident that the witness is testifying to his conclusion when he says that "Gilson said he had an agreement with Landis." The witness drew no distinction between the alleged statement "I am going to get the land" and "I have an agreement by which I shall get the land."

This witness testified that this conversation was in the spring of 1902, but he is unable to fix the date by any circumstance, simply depends upon his memory (page 24, near bottom). If he is as careless in fixing the date as he is in repeating what he claimed Gilson said, he might easily be mistaken a year, it being remembered that he was testifying to

occurrences happening years before. But even though Gilson said he had an agreement with Landis to buy this land the statement falls far short of proving that this was an agreement made before Landis made his entry.

The witness, Fred Seymor, testified (page 27):

"Q. They were getting witnesses for final proof?

A. Yes, sir.

Q. Did Mr. Gilson, at that time, say anything about he was going to get the place?

A. What he said, he was furnishing Landis money and told in the neighborhood all about what it would cost him and said he was giving Landis One Hundred Dollars and was getting the property.

Q. Did he say what Landis was going to do with the property when he got it?

A. No."

The very nature of the language employed here, viz: "Told in the neighborhood," indicates that this witness was testifying to matters rumored about the neighborhood, and not to any specific statement made by Gilson in his presence. No date is given when these alleged statements were made by Gilson, and the language is so loosely employed that it might very easily be explained on a theory consistent with Gilson's innocence of any fraud.

D. T. Meyer, a witness for the plaintiff, testified (page 32):

"Q. Did you ever talk with Mr. Gilson about the place?

A. I think only once.

Q. Well, make it short. Did he ever say anything to you about owning the place?

A. No, I don't think he ever did. I told him once —we had a little dispute over some money and I told him he had got that land fraudulently and he turned off and walked from me and wouldn't answer me, and that is about the only conversation I have had with Mr. Gilson in regard to the land."

In other words, because Gilson, like a law-abiding citizen, refused to further continue a dispute, but turned and walked away when charged with procuring this land fraudulently, the charge is presumed to be true. Such evidence is not worthy of consideration. This witness, at this time, made no reference to any statements made by Landis to him with reference to any agreement between Landis and Gilson. He was recalled as a witness on the 25th day of September to testify in this regard and testified that he knew Mr. Landis for a couple of years (page 35); that the first conversation he had with him in regard to this land was at Brooks' house; that Mr. Brooks was present at these conversations. At page 38, he testified:

"Q. Who was present when you had these conversations, anybody?

A. Mr. Brooks was present. The first time, I think I ever heard Mr. Landis express himself, it was

in Brooks' house and I think he heard the conversation. I think he did."

He further testified that Landis frequently told him, both before and after proving up, that he was getting $100.00 for his homestead right from Gilson, but when asked to state the date, he was unable to tell whether he had the conversation in 1901, '02, '03 or '04 (page 37), so that it were as easy that these statements were made after Landis had sold the homestead as before, and that he had received $100.00 instead of was going to receive $100.00, and it is but natural that an aged and childish man, like Landis, might have made as many and all the statements as are attributed to him by this witness, who testified (page 38) that Landis talked childishly. If these conversations between Landis and Meyer occurred in Mr. Brooks' house in Mr. Brooks' presence, as testified to by Meyer, it is strange that Brooks did not testify to them, and a search of his testimony fails to disclose any reference to any statement made to him by Landis, although he said Landis lived with him one winter before he proved up on the land (pages 29 and 39).

It seems also strange that the witness, Meyer, did not testify, when first called in August, to these conversations. From his own testimony, it appears that he had some trouble with Gilson (page 32) and was able to think of far more damaging testimony on being called the second time than he recalled at the first hearing, yet only when a leading question was

put, virtually putting the answer into his mouth, did he testify to any agreement being made between Mr. Gilson and Mr. Landis previous to proving up (page 39).

The witness, Joseph H. Lancaster, for the plaintiff, testified that Gilson offered to furnish him money to prove up on his entry; that he would do the same with him as he had with Landis; that he offered him $150.00 or $250.00, witness couldn't state which (page 45). About the middle of page 45, he testified:

"Q. Did he tell you what he had done with Mr. Landis?

A. He told me that he offered him—whether he had given him $150.00 or $250.00—it was either one of the two he had given him; that he would make the same proposition to me that he had with Mr. Landis."

The witness, Meyer, testified that Landis told him he received $100.00 from Gilson (page 36), and there is nothing in the testimony of either to indicate any unlawful agreement.

The testimony referred to and quoted constitutes substantially all the testimony offered to show an agreement between Landis and Gilson. Gilson testified (page 67) positively denying any agreement whatever. Landis, in making final proof, also positively testified that there was no agreement (page 64).

Are the statements of these three witnesses, Bryant, Seymor and Meyer, of alleged admissions of Gil-

son, inconsistent with each other as they are, unnatural in their nature, meagre and rambling, sufficient to overcome the positive denial under oath of the defendant, Gilson? Are the statements of the witnesses, Meyer and Lancaster, as to alleged admissions of the entryman, Landis, likewise inconsistent, unnatural, contradictory and rambling, sufficient to overcome the sworn testimony of Landis before the Register, particularly when more than six years had intervened and in the meantime Landis had died?

How easy it is for a witness testifying six or eight years after an occurrence of this sort to confuse what a witness said of a transaction after it was closed with what he said about it while it was pending. For instance, these witnesses may have had an idea at the time Landis was living on the land that he was merely an agent of Gilson and that an agreement that Landis should convey the land to Gilson existed between them. Landis proves up on the land; patent issues to him; he sells to Gilson. This result is sufficient to confirm their suspicions. Then Landis, an old and childish man, ramblingly (page 38) tells how much Gilson paid him for the land; what he actually received; then six or eight years intervene. The witnesses perhaps unintentionally confuse in their minds what they thought the arrangement was with what the party afterwards told them did happen, and they come in and testify, not as to what was actually said to them in fact existed, but to their conclusions as confirmed by what ultimately resulted.

But it is said that not only the testimony of these witnesses as to these alleged admissions, but the circumstances point to the conclusion that there was an agreement between Landis and Gilson. Let us examine the circumstances. Judge Gilbert in his opinion (pages 108 to 109) says:

"Landis was past seventy years of age, was decrepit and destitute. The appellant sought him out, took him to the land and pointed it out to him, induced him to settle on it, and negotiated and paid for the relinquishment of a prior settlement thereon. He paid the fees incident to the entry, and the fees when final proof was made. There is evidence that he was cognizant of the nature and extent of the improvements and cultivation made by Landis, and that he was aware of the untruth of the final proofs which were made of such settlement and cultivation. From the time of the entry, Landis was engaged in doing light jobs of work for the appellant, whose house was but a quarter of a mile from the claim in question, but there was no agreement as to wages, and during the whole period of Landis' residence on the land, the appellant furnished him groceries and supplies and small sums of money from time to time for his support, all without any security for repayment."

The testimony shows that Gilson had considerable land in the vicinity and kept stock there; that he needed somebody to watch the stock and went to Sheriff Grant at North Yakima and asked him if he knew of an old man that could come up there and look after things while Gilson was away; that Gilson wasn't able and didn't have money to pay a man good

wages for staying there (pages 74 and 75, also 85). Grant referred him to Landis and it was arranged that Landis should go out there and work for Gilson and incidentally take up a piece of land; that Gilson would furnish groceries and assist Landis in every way possible in acquiring title to the land (pages 69 to 77, also 85); that Gilson, in pursuance of this arrangement, furnished Landis money for groceries and for making his proof, kept an accurate account of Landis' indebtedness, but took no security (page 72); that when Landis made his proof and commuted Gilson furnished the money and took a mortgage as security; that Landis tried to sell the land, but being unable to find a purchaser, deeded it to Gilson shortly after receiving patent (page 67).

From these circumstances, together with the testimony of alleged admissions, it is contended that fraud is established, which demands cancellation of patent. Fraud will not be presumed. He, who alleges it, must prove it by clear, unequivocal and convincing proof. It is not unusual that a settler of the frontier extends credit to another frontiersman without security other than the situation in which he finds him. That to a man engaged in business in city life might be deemed hazardous and foolish. Here were men who probably became better acquainted with each other in two or three days than a resident of a city would become acquainted with his next door neighbor in as many years. They were men of simple life. They had no neighbors, no asso-

ciates. There might have been, and doubtless was, a feeling of trust between them, natural enough to the situation, but unknown to the hardening life of the city business man. The writer of this brief has had some chance to observe the daily life of the "lumber jack" of the northern woods. It is not an unusual occurrence for one "jack" to stake another for all the money he possesses, perhaps on the acquaintance of only a few hours, and to the credit of that class, known as "lumber jacks," let it be said that confidence under such circumstances is seldom misplaced. Gilson says that he trusted this man. He swears that there was no agreement between him and Landis. Landis, dead at the time of taking testimony in this suit, swore at the time of making final proof that no agreement existed with Gilson or anyone. Who is going to say that because Gilson extended credit to this old man without security, and held out a helping hand to this needy frontiersman, that the both of them were trying to defraud the United States of America and that they perjured themselves, Landis for the paltry sum of $100.00 in addition to a meagre existence for two or three years, and Gilson to get his land by paying more for it than it was actually worth? And the testimony is undisputed that this land cost Gilson more than it was worth at the time; Gilson so testified (page 68); Fayenne so testified (page 87); nobody contradicted it.

Now, it is a matter of common knowledge that in a new country when public lands are being constantly entered under the homestead law, that the ordinary

settler knows perfectly well that the land embraced in any entry cannot be sold, or an agreement made to sell it prior to final proof, and that on final proof the witnesses are examined as to this very point, and it is in evidence that Gilson had taken a homestead and so must have known that witnesses would be asked, when Landis made final proof, as to whether Landis had made any agreement to sell the land. It is, therefore, incredible that Gilson should, if he had an agreement to buy the land, tell a man whom he was trying to get to act as a witness, of that fact, and not only that, but publish that man's name as one of the witnesses.

Now, all of the direct testimony of the plaintiff as to any agreement between Gilson and Landis is the testimony of these admissions, and it will be profitable to look into the value of this kind of evidence generally. In the first place, witnesses can never remember all of the conversation and repeat it word for word, and, therefore, the court is in possession of a part, and usually a very small part of what is said, and there is always the probability that the part not remembered would greatly modify the meaning of what is remembered. Second, the witness that can remember the exact words used in a conversation that took place six years before is such a rarity that when one claims that he can, we take it "with a grain of salt." Third, evidence of this kind is almost invariably the impression that the witness got from the conversation.

Now, men and courts often differ as to the meaning of the most carefully written instrument, and it goes without saying that a witness that hears a conversation frequently does not get the impression that the speakers intended to convey.

Fourth, human memories are fickle and frail, and frequently one part of a conversation is remembered, while a part of such conversation that essentially modifies it, is entirely forgotten.

Fifth, witnesses frequently color their testimony and slightly change the phraseology to suit their side of the case, and even perfectly honest witnesses do this unconsciously.

Taking all of these things together, such evidence is the weakest that can be produced in court, and when it is attempted by that kind of evidence to set aside a written grant by patent of real property, the courts always refuse, and we do not believe that the counsel for plaintiff can cite a single case when a patent or deed or will, or any paper of similar kind, was ever set aside on that kind of proof.

As to proof of facts by the oral declaration of a party, the courts have always characterized them as the weakest kind of evidence. Says Moore in his work on Facts:

"No species of testimony is more emphatically denounced in judicial opinions as weak and dangerous than testimony to declarations or admissions in loose or random conversations."

Moore on Facts, Sec. 1169.

Testimony to oral declarations of any person, including admissions of a party, is regarded not only as unreliable, but dangerous, and is invariably received with caution because of the danger both of misunderstanding and misrecitation of what was said. Moore on Facts, 1148.

In a somewhat extended experience of jury trial, we have been compelled to the conclusion that the most unreliable of all evidence is that of oral admissions of the party—when we reflect upon the inaccuracy of many witnesses in their original comprehension of a conversation, their liability to mingle subsequent facts and occurrences with the original transactions, and the improbability of recalling the precise terms used by the party, or of translating them by exact equivalents, we must conclude that there is no substantial reliance in this kind of testimony.

Redfield, C. J., Note to Greenleaf on Evidence, 12 Ed., Sec. 200.

Of all kinds of evidence that of extra judicial and casual conversation is the weakest and most unsatisfactory. Such words are often spoken without serious intention and they are always liable to be mistaken and misremembered, and their meaning is apt to be disrepresented and exaggerated.

11 Starkie on Evidence, 7 A. M. Ed. 549.

See also Wigmore on Evidence, Sec. 2094, pages 281 and 223.

Such testimony is the most dangerous that can be admitted in a court of justice and the most liable to abuse.

Chancellor Walworth in Law vs. Merrills, 6 Wend. 268, cited in re Kaldenberg, 105 Fed. Rep. 233.

Parole evidence may be offered of confessions (Species of evidence of which it has often been said, it is hard to disprove and easy to fabricate) applicable to such remote times as may leave no means to trace the nature, extent or origin of the claim, and thus opens the way for the most oppressive charges.

Justice Story in Bell vs. Morrison, 26 U. S. 359, 7 L. Ed., page 178.

This is an action to set aside a conveyance of land made with the utmost formality after a hearing held upon notice and upon the sworn statements of three witnesses. Speaking of an attempt to set aside such an instrument, C. J. Cooley says:

"The law does not permit the title to rest in parole, nor does it allow anything which is evidenced by the deeds to be changed by parole, testimony of promise, agreement or understanding. But by this doctrine, while the instruments of title are conceded to be indisputable, they are allowed to be set aside on parole evidence of the owner's admissions and statements, though this species of evidence is confessed to be the least reliable which the laws admit. The best evidence of title is thus allowed to be overcome and set aside by the weakest.

A conversation misunderstood or falsely reported controls the most perfect chain of conveyance and

any estate is liable to be taken from the owner on the impression which a jury receives from the preponderance of evidence concerning words which witnesses may have imperfectly heard or incorrectly understood, or the purport of which they may have unintentionally colored or purposely wrenched from its real meaning in the mind of the speakers."

Hays vs. Livingston, 34 Mich., page 396.

Testimony with regard to verbal statements should be received with great caution. The evidence, consisting as it does, in the mere repetition of oral statements, is subject to such imperfections and mistakes in consequence of the person speaking not having clearly expressed his own maning, or in consequence of the witness having misunderstood him, it frequently happens that the witness by unintentionally altering a few of the expressions really used gives an effect to the statement completely at variance with what the person in fact did say.

Ellis vs. Oil Co., 110 N. W., on page 24.

As a general rule evidence of admissions should be received with caution. The unintentional change of a single word often gives an entirely different meaning to what may have been said.

Oberholtzer vs. Hazen, 70 N. W., 207.

From these citations it will be seen that proof of such admissions as are contained in this record are considered by the courts as the weakest kind of evidence that can be produced, while the rule of evidence in cases of this kind is that the evidence must be

the strongest and best. Says the Supreme Court of the United States:

"To cancel a patent, the evidence of fraud must be clear, unequivocal and convincing and clearly sustained by the proof."

U. S. vs. Maxwell, 211 U. S. 325, 30 L. Ed. 949.

Only that class of evidence that commands respect and the amount which produces conviction, clear, convincing and unambiguous.

Colo. Coal & I. Co. vs. U. S. 123, U. S. 307, 31 L. Ed. 186.

In this last case, which was reversed by the U. S. Supreme Court, we think the evidence was stronger than in the case at bar.

See also to same effect, U. S. vs Stinson, 197 U. S. 200, 49 L. Ed. 725, in which the court says:

"The government is subjected to the same rule respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.' * * * *

"The conduct of Stinson does not indicate a consciousness of wrongdoing. He remained a resident of the locality, the title was not transferred, there was no attempt to place in the hands of a bona fide purchaser,—no such conduct as would ordinarily characterize a conscious wrongdoer."

All of this can be truthfully said of Gilson.

The evidence of the plaintiff is clearly insufficient to make such a case as is required under the foregoing authorities without considering the defendant's evidence. And Gilson denies making the statements and denies the allegations that he had any agreement or misunderstanding with Landis whereby he was to get the title to the land. The undisputed evidence in the cause shows that the land was not worth more than the Government price; (pages 69 and 87) this being the case, there could be no possible object in conspiring to defraud the government to get the land, for why should one commit fraud and run the risk of punishment to get an opportunity to buy land at its full value.

There is one fact that shows that it is extremely improbable that there was any understanding between Gilson and Landis prior to the time that Landis filed on the land that Gilson should get the land, and that is the time that elapsed after the land was filed on until final proof was made. The filing was on November 13th, 1899, while final proof was not made until November 22d, 1902, three years after. Now he could have commuted the homestead entry just as well in fourteen months, and it is not likely, if Gilson was keeping the old man so that he could make proof and get the land, that he would have waited almost two years longer than was necessary before proving up and getting the land. Now Gilson would hardly have waited all of this time, supporting

Landis, taking the risk of Landis dying or getting sick of his bargain and throwing up the whole matter, but would have had proof made at the earliest possible date.

So, too, the smallest of the improvements are themselves a strong circumstance to show that there was no such agreement, as, if Gilson was the party in interest and wanted the land badly enough to try to get it fradulently he would probably have taken no risks of the entry being cancelled for lack of improvements, or of the rejection of the final proof for the same reason; while Landis, being too poor to make any further improvements, it was just what would have been expected of him.

Where a purchaser finds that a patent has been issued he is not required to look behind it.

Lea vs. Polk County Copper Co., (U.S.), 16 L. Ed. 203;

Bagnell vs. Broderick, (U. S.), 10 L. Ed. 235;

U. S. vs. California & Oregon Land Co., (U. S.) 37 L. Ed. 354.

If patent issue before attack, it is immaterial whether purchase is made before or after issuance of patent.

U. S. vs. Clark, 125 Fed. 774.

As to bona fide purchaser of public land, see U. S. vs. Detroit Timber & Lumber Co., 131 Fed. 674. 50 L. Ed. 499.

We, therefore, ask that the judgment of the lower court be reversed and it be ordered that the case be dismissed.

Respectfully,
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